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No. 90-7477

In The

Supreme Court of the United States

October Term, 1991

WILLIAM LEWIS SMITH,

Petitioner,

v.

WAYNE S. BARRY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a pro se pleading, in the form of a brief, may serve as a notice of appeal within the meaning of Rule 3(c) of the Federal Rules of Appellate Procedure, if it contains the information required by that rule, is timely filed, and notifies the court and the parties of the appellant's intent to appeal?

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinion of the Court of Appeals, J.A. 32-37, is reported at 919 F.2d 893. The judgment of the Court of Appeals, J.A. 38, is not reported. The judgment of the United States District Court for the District of Maryland, J.A. 8, is not reported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1) (1988). The judgment of the Court of Appeals was entered on November 29, 1990. A petition for rehearing and a suggestion for rehearing *en banc* were denied on December 26, 1990. The petition for a writ of certiorari was filed with this Court on March 22, 1991.

RULES INVOLVED

The pertinent portions of the following rules are reproduced in the appendix to this brief:

1. Rule 3(a) and (c) of the Federal Rules of Appellate Procedure (with pertinent portions of the Notes of the Advisory Committee on Appellate Rules);
2. Rule 4(a) of the Federal Rules of Appellate Procedure (with pertinent portions of the Notes of the Advisory Committee on Appellate Rules);
3. Form 1 of the Federal Rules of Appellate Procedure;
4. Local Rule 34(b) of the United States Court of Appeals for the Fourth Circuit;

5. Internal Operating Procedure 34.6 of the United States Court of Appeals for the Fourth Circuit; and

6. Internal Operating Procedure 46.5 of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

Petitioner, William Lewis Smith, challenges the Fourth Circuit's refusal to consider his pro se informal appellate brief as a valid notice of appeal within the meaning of Rule 3(c) of the Federal Rules of Appellate Procedure ("Rule 3(c)").

On September 27, 1983, Smith, then an inmate at the Maryland Penitentiary, brought this pro se[1] action pursuant to 42 U.S.C. § 1983 against then State Commissioner of the Division of Corrections Jon P. Galley; Maryland Penitentiary Warden George H. Collins; seven correctional officers, Lawrence Carpenter, Robert Victor, Arnold Turner, Bobby R. Hall, Robert Brown, David Jackson, and Lakamon Wilkins; two staff psychologists, Dr. Daniel Porecki and Dr. Robert Ellis (collectively "the State employees"); and one medical doctor, Dr. Wayne Barry, claiming violations of his eighth amendment rights. R. 1. Smith suffered from a psychogenic pain disorder which prevented him from walking or placing any weight on his legs and feet. J.A. 32-33. In his suit, he alleged, *inter alia*,

[1] While Smith filed his action pro se, counsel was appointed on October 18, 1985 to represent him in the district court. R. 40. Trial counsel declined to represent Smith on appeal, R. 67, and Smith proceeded pro se until the Fourth Circuit appointed counsel on August 2, 1989.

that the prison's medical, psychological, and custodial staffs denied him a wheelchair for over two years, and that his inability to walk, combined with the defendants' decision to force him to exist without a wheelchair, resulted in his sustained inhuman treatment. R. 1.

One of the defendants named above, Dr. Barry, is a private physician who treated Smith and generally provided medical services to inmates at the penitentiary pursuant to a contract with the State of Maryland. J.A. 33. After being served with Smith's complaint, Barry filed a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, alleging that he provided nonsupervisory, noncustodial medical services to inmates and, therefore, did not act under color of state law as required by 42 U.S.C. § 1983. R. 23. The district court entered an order dismissing Barry, relying entirely on *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984) (physicians who provide nonsupervisory and noncustodial medical services to inmates pursuant to a contract with the state do not act under color of state law), *cert. denied*, 471 U.S. 1132 (1985). J.A. 4-7.

At trial, Smith claimed that six correctional officers physically abused him and were deliberately indifferent to his medical needs because they intentionally denied him a wheelchair. At the conclusion of Smith's case in chief, the district court on February 24, 1988 directed a verdict in favor of all of the prison guards as to the claim regarding denial of the wheelchair. The court found "no evidence that would show that they are in a position to act in any meaningful way in regard to the Plaintiff's medical and psychological needs . . . . " Tr. 41 (Feb. 24,

1988).[2] The excessive force claims against four of the guards (Victor, Wilkins, Jackson, and Brown) went forward, and the jury found in favor of the guards. R. 57. The jury also found that the two psychologists, Ellis and Porecki, were deliberately indifferent to Smith's serious medical needs and awarded Smith $15,000 in damages. R. 57.

On February 29, 1988, the district court entered judgment in favor of Smith and against Ellis and Porecki, and in favor of the remaining State employees and against Smith. J.A. 8. The two psychologists filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The district court entered an order denying the motion on April 14, 1988. J.A. 16. Smith's counsel responded to the motion for judgment notwithstanding the verdict, R. 63, but declined to represent Smith on appeal. J.A. 17.

On March 22, 1988, while the Rule 50(b) motion was pending, Smith filed a pro se notice of appeal. J.A. 10. Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, "[a] notice of appeal filed before the disposition of [a Rule 50(b) motion] shall have no effect." Even

[2] The district court also granted a directed verdict in favor of Commissioner of Corrections Galley and Penitentiary Warden Collins on the excessive force and deliberate indifference claims because they were not personally involved in the decision to deny Smith a wheelchair and, as supervisory personnel, they were not legally responsible for an isolated incident involving the use of excessive force. Tr. 38-39 (Feb. 24, 1988).

though Smith's notice of appeal was a nullity, no party moved for dismissal, and the appeal proceeded.[3]

Pursuant to Fourth Circuit Local Rule 34(b), *see* App. 10, the clerk's office sent pre-printed "informal brief" forms to all of the parties in the case after Smith filed his pro se appeal. J.A. 11-13. Informal briefs are used by the Fourth Circuit whenever: 1) a pro se appeal is filed; 2) an application for a certificate of probable cause from the denial of a writ of habeas corpus is made; or 3) an appeal from the denial of a motion under 28 U.S.C. § 2255 is taken. App. 10. Although titled informal briefs, these papers become the primary documents of advocacy as "parties may file a formal brief only with the permission of the Court." App. 11.

Barry, represented by counsel, was the first to respond to Smith's appeal: On April 28, 1988, he filed the informal brief form that had been sent to him by the clerk's office. J.A. 19-22. The informal brief relied entirely on the Fourth Circuit's decision in *Calvert* to support Barry's dismissal from the case. He made no claim that Smith's notice of appeal was premature.

On May 4, 1988, Smith, proceeding pro se, filed his informal brief, 20 days after the Rule 50(b) motion was

[3] On April 21, 1988, Smith's former attorney sent him a letter stating that the notice of appeal was premature and that Smith had until May 13, 1988 to file a timely notice of appeal. He also strongly suggested that Smith abandon any appeal and made it clear that, if Smith decided to proceed, he would not represent him. J.A. 17-18. Although this letter also was sent to the Assistant Attorney General representing the State employees and the district court judge, the appeal proceeded.

denied and within the required time period for filing a notice of appeal. J.A. 23-26. Smith answered the questions on the form and sent copies to the Fourth Circuit and all parties. In response to the question, "What action do you want the Court to take in this case," Smith responded, in part, that he wanted "[a] new trial on all issues triable by Jury." J.A. 24.

On June 24, 1988, Barry filed a supplement to his informal brief, addressing this Court's decision in *West v. Atkins*, 487 U.S. 42 (1988), which overruled *Calvert*. J.A. 27-28. He abandoned the claim that he was not subject to suit because of *Calvert*. In the final two paragraphs of the supplement, however, Barry asserted for the first time that the propriety of his dismissal from the case was not properly before the Fourth Circuit because "no appeal from the December 26, 1984 Order of Dismissal was taken by the plaintiff." J.A. 28. Again, at no point in the supplement did Barry mention that Smith's notice of appeal was filed prematurely. On July 20, 1988, Smith responded to Barry's supplement by filing a supplement to his own informal brief requesting that the Fourth Circuit reverse the district court's order granting Barry's motion to dismiss. J.A. 29-31.

The State employees, represented by the Attorney General, proceeded as follows: On May 12, 1988, the two psychologists, Ellis and Porecki, filed a notice of appeal. R. 70. On September 29, 1988, Ellis and Porecki, joined by the other State employees, moved to withdraw these appeals, stating "[we] move this Court . . . to proceed with Appellant's Pro Se Appeal filed on or about March 22, 1988." Joint Appendix filed in the Fourth Circuit at 133. They further declared that they "[stood] ready to

defend the appeal filed in Pro Se by Appellant William Lewis Smith." *Id*. On November 7, 1988, the Fourth Circuit dismissed the appeals filed by the State employees. *Id*. at 134.

On August 2, 1989, the Fourth Circuit appointed counsel for Smith and asked for formal briefing. In addition to the Rule 3(c) issue raised here, Smith argued that: 1) the dismissal of Barry should be vacated because of this Court's ruling in *West v. Atkins*; and 2) the court should reverse the directed verdict in favor of the correctional officers on the deliberate indifference claim for denial of a wheelchair. J.A. 35.

On November 29, 1990, a panel of the Fourth Circuit dismissed Smith's appeal for lack of jurisdiction, finding that his informal brief could not substitute for a notice of appeal. The court noted that Rule 3(c) is "construe[d] . . . liberally, especially when applied to papers filed pro se by an indigent prisoner," and recognized that the Rule's requirements are satisfied:

> "by any statement . . . that clearly evinces the party's intent to appeal" and which "accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of the appeal."

J.A. 35 (*quoting Cobb v. Lewis*, 488 F.2d 41, 45 (5th Cir. 1974)).

Yet the Fourth Circuit held that Smith's informal brief could not serve as the "functional equivalent" of a notice of appeal for three reasons. First, the court adopted the position of the Fifth Circuit that a brief may *never*

serve as a notice of appeal, and rejected a contrary holding of the Third Circuit. J.A. 37. Second, the court also found that the informal brief could not serve as a notice of appeal because Smith's brief was not "initiate[d]" by him, but was merely a response to the court's "Order to Proceed on Informal Brief." J.A. 36. Finally, the court stated that the usual "solicitude afforded to pro se litigants [was] greatly diminished, even if not erased" because Smith's court-appointed attorney, who was not representing him on appeal, wrote Smith a letter advising him that his premature notice of appeal was invalid. J.A. 36.

The Fourth Circuit denied Smith's petition for rehearing and suggestion for rehearing *en banc* on December 26, 1990. J.A. 39. This Court granted Smith's petition for writ of certiorari on June 28, 1991. J.A. 40.

SUMMARY OF ARGUMENT

The court of appeals ruled that a brief may not substitute for a notice of appeal even if it otherwise meets the requirements of Rules 3 and 4 of the Federal Rules of Appellate Procedure. J.A. 37. This conclusion is contrary to the plain language of Rule 3(c), the Notes of the Advisory Committee on Appellate Rules ("Advisory Committee Notes"), and this Court's decisions.

Rule 3(c) provides that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." As the Advisory Committee Notes indicate, the drafters intended that any document manifesting an intent to appeal should be considered a valid notice of

appeal: "In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. . . . The proposed amendment would give recognition to this practice." App. 3.

The Fourth Circuit accepted this "functional equivalence" approach, but reasoned that the appellate rules require that the notice of appeal and the brief be separate documents. J.A. 35-37. This reasoning has no support in the language of the rules. The functional equivalence standard permits any document to fulfill its stated purpose and also serve the function of a notice of appeal. When one document serves two purposes, no requirement under the rules is circumvented.

Further, this Court's decisions direct the courts of appeals to take "a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal . . . to preserve the jurisdiction of the Courts of Appeals." *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962). Nor is this "liberal view" limited to pro se pleadings. In *Foman v. Davis*, 371 U.S. 178, 181 (1962), this Court reversed a decision dismissing an appeal because the notice of appeal designated the wrong ruling appealed from. More recently, this Court reaffirmed *Foman*'s liberal approach and held that functional equivalence is the correct standard to use when measuring compliance with Rule 3(c)'s requirements. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988). The Fourth Circuit's refusal to consider any brief as the functional equivalent of a notice of appeal cannot be reconciled with these decisions.

In this case, because Smith's informal brief manifested his intent to appeal and otherwise complied with the requirements of Rule 3, it perfected his appeal. The informal brief was: 1) timely filed; 2) served on all parties to the litigation; and 3) identified the court, the party appealing and the judgment appealed from. Read alone, or in context with his prematurely-filed notice of appeal, Smith's informal brief clearly evinced his intent to appeal.

Moreover, the pleadings submitted by the other parties demonstrate that they had a clear understanding that Smith wished to appeal the final judgment entered by the district court. In this situation, there is no prejudice to any of the parties arising from the deficiencies in Smith's "notice of appeal," and the court of appeals should have accepted jurisdiction and decided the case on its merits.

ARGUMENT

I. ANY DOCUMENT THAT IS THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL PERFECTS JURISDICTION IN THE COURT OF APPEALS

The court of appeals ruled that "an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4." J.A. 37. The disqualification of an entire class of documents from eligibility as notices of appeal is contrary to the plain language of the Rule, the Advisory Committee Notes, and this Court's decisions.

A. Rule 3(c) and the Advisory Committee Notes require courts to look for functional equivalence, not literal compliance, when assessing whether jurisdiction over an appeal has been perfected

When faced with a question concerning the interpretation of a federal rule, the analytical starting point is an examination of the language of the Rule. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350 (1981) (when interpreting rule "answer is dictated by the plain language, the purpose, and the history" of the rule); *see also Schiavone v. Fortune*, 477 U.S. 21, 30 (1986) (in interpreting rule, "[w]e accept the Rule as meaning what it says").

Rule 3(c) provides as follows:

Rule 3. Appeal as of Right – How Taken

. . . .

> **(c) Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

That no particular significance attaches to any separate document titled "notice of appeal" is evident from the final sentence of the Rule. This sentence was added in 1979.[4] It stands as a straightforward admonition:

[4] The new sentence was part of a set of amendments to the Federal Rules of Appellate Procedure that "were designed to

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"informality of form or title" shall not serve as a jurisdictional bar to an otherwise timely filed appeal.

Any doubt about Rule 3(c)'s meaning is dispelled by the Advisory Committee Notes, which are " 'of weight' " when interpreting a rule. *Schiavone*, 477 U.S. at 31 (*quoting Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946)). The general note accompanying Rule 3 states that the Rule is not to be strictly construed. It provides that "decisions . . . which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules [Rules 3 and 4]." Rule 3 Advisory Committee's Note. As examples of these earlier decisions, the note quotes from *Coppedge v. United States*, 369 U.S. 438 (1962), where this Court observed that "a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been

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remove pitfalls in the appellate process and make the process of appealing a judgment easier." Adams, *The Timing of Appeals Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure*, 123 F.R.D. 371, 375 (1988). The 1979 amendments to Rule 4 of the Federal Rules of Appellate Procedure ("Rule 4"), governing the timing of appeals, evinced a similar intent to "remove pitfalls in the appellate process." For example, Rule 4(a)(2) was added in 1979: "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." In addition, the "good cause" language of Rule 4(a)(5) was added in order to "expand[ ] to some extent the standard for the grant of an extension of time." Rule 4(a)(5) advisory committee's note. Also, Rule 4(a)(1) was amended to permit an appeal to proceed even if the notice of appeal was filed in the circuit court as opposed to the district court.

used to preserve the jurisdiction of the Courts of Appeals." *Id.* at 442 n.5.[5]

The drafters' understanding of the criteria of "equivalen[ce]" is set out in the note explaining the 1979 amendment to Rule 3(c). This note begins by pointing out the harsh jurisdictional consequences of an untimely filed notice of appeal and then states that the 1979 amendment was thought necessary in order to narrow the scope of this jurisdictional bar:

> it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. See, e.g., *Cobb v. Lewis*, (CA5th, 1974) 488 F.2d 41; *Holley v. Capps* (CA5th, 1972) 468 F.2d 1366. The proposed amendment would give recognition to this practice.

Rule 3(c) Advisory Committee's Note. As the note explains, the chief criterion in assessing "equivalen[ce]" is simply whether "a paper" has been filed which evinces a party's intent to appeal. If such "a paper" has been filed, the "substance" of the Rule has been satisfied.

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[5] The Advisory Committee Note also cites *Fallen v. United States*, 378 U.S. 139 (1964). There, in reversing a determination that Rule 37(a) of the Federal Rules of Civil Procedure required in each and every case that a notice of appeal be in the hands of the clerk before the 10th day, this Court stated that "the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Id.* at 142.

The Advisory Committee's citation to *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), as one of "a number of decided cases" illustrative of this practice is also informative.[6] There, the Fifth Circuit ruled that a plaintiff's petition for leave to appeal under 28 U.S.C. § 1292(b) satisfied the requirement for a notice of appeal. The court reached this conclusion after examining the numerous types of documents which other courts have held satisfy the notice of appeal function, stating that:

> These cases teach that the notice of appeal requirement may be satisfied by any statement, made either to the district court or to the Court of Appeals, that clearly evinces the party's intent to appeal. Such a statement accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of the appeal.

Cobb, 488 F.2d at 45.

Among the cases cited by the *Cobb* court as "teach[ing] that the notice of appeal requirement may be satisfied by any statement . . . that clearly evinces the party's intent to appeal" was *Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863 (1965). In *Frace*, the requirement of a notice of appeal was found satisfied by a "Brief for Appeal" filed in the court of appeals. *Id.* at 903. The Advisory Committee's citation to *Cobb* thus takes on

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[6] One of the generally accepted canons of construction is that an "amended statute should be interpreted in light of the court decisions that . . . prompted the amendment." 1A N. Singer, *Sutherland Statutory Construction* § 22.29, at 263 (4th ed. 1985).

added significance in the present case because *Cobb* endorsed the view that a brief could serve as a party's notice of appeal.

The Fourth Circuit, however, declined to take a liberal view of Smith's appellate brief. In its view, the Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings: "To collapse the two into one would . . . eliminate entirely the requirement for the filing of a notice of appeal." J.A. 37.[7] This conclusion has no support in the language of the rules. The existence of separate provisions suggests only that in the typical case, an appellant will file a notice of appeal shortly after final judgment is entered, and prepare a brief sometime later. That this sequence of events does not always take place, however, is inconsequential. There is no provision in the rules dictating that one document may not serve two purposes and, as discussed *infra*, the federal courts have long held that a single document may serve two purposes under the rules.

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[7] The Fourth Circuit, in reaching this conclusion, relied on the Fifth Circuit's decision in *United States v. Cooper*, 876 F.2d 1192, 1196 (5th Cir. 1989), and the Eleventh Circuit's decision in *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172, 1173 (11th Cir. 1983). The reliance on the Eleventh Circuit's decision is misplaced. In *Finch v. City of Vernon*, 845 F.2d 256, 259 (11th Cir. 1988) (per curiam), the Eleventh Circuit ruled that a pro se brief could substitute as a notice of appeal where it was "quite clear that [appellants] intended to appeal" from the judgment below.

B. The decisions of this Court interpreting Rule 3(c) consistently hold that its provisions are to be construed liberally in favor of preserving jurisdiction

This Court, when defining the proper standard of review for applications to proceed *in forma pauperis*, approved decisions that applied a functional equivalence approach to all manner of documents. *Coppedge v. United States*, 369 U.S. 438, 442 (1962). In *Coppedge*, this Court noted that because the federal courts had taken "a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal," *id.* at 442 n.5, these defendants generally experience "no material difficulty in filing a timely notice of appeal," *id.* at 442. Applying this "liberal" approach, the federal courts have ruled that all manner of documents can serve their intended purpose and also serve as a notice of appeal.[8]

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[8] In *Coppedge*, this Court cited numerous cases that allowed various types of documents to substitute as notices of appeal. *Coppedge*, 369 U.S. at 442 n.5. Other documents that have been accepted by the federal courts since *Coppedge* as the equivalents of notices of appeal include the following: *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 877 (3d Cir. 1990) (alternate holding) (civil appeal information sheet); *United States v. Christoph*, 904 F.2d 1036, 1040 (6th Cir. 1990) (motion for enlargement of time), *cert. denied*, 111 S. Ct. 713 (1991); *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 555 (3d Cir. 1989) (consent order), *cert. denied*, 110 S. Ct. 844 (1990); *In re Bertoli*, 812 F.2d 136, 138 (3d Cir. 1987) (motion for the certification of an interlocutory appeal); *San Diego Committee Against Registration & Draft (CARD) v. Governing Bd. of Grossmont Union High School Dist.*, 790 F.2d 1471, 1474 (9th Cir. 1986) (motion for permission to appeal order pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure); *United States v.*

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Nor is this approach restricted to cases involving pro se appellants.[9] In *Foman v. Davis*, 371 U.S. 178 (1962), a contract action, this Court addressed the requirement that a notice of appeal contain a designation of the judgment appealed from.[10] *Foman* made it plain that the notice of appeal provision should not be so narrowly construed as to ignore its simple purpose:

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Whitaker, 722 F.2d 1533, 1534-35 (11th Cir. 1984) (motion for release pending appeal); *Yates v. Mobile County Personnel Bd.*, 658 F.2d 298, 299 (5th Cir. Unit B 1981) (per curiam) ("Petition for Supervisory Writ of Mandamus and Certiorari"); *Laser Alignment, Inc. v. ICM of the Carolinas, Inc.*, 32 Fed. R. Serv. 2d 776, 778-79 (4th Cir. 1981) (unpub. op.) (statement of issues filed pursuant to Rule 10(b)(3) of the Federal Rules of Appellate Procedure); *Cobb v. Lewis*, 488 F.2d 41, 44-46 (5th Cir. 1974) (petition to file interlocutory appeal).

Several courts of appeals have held that an appellate brief may satisfy the notice of appeal provision. *See Allah v. Superior Court of State of California*, 871 F.2d 887, 889-90 (9th Cir. 1989) (concluding that brief may serve as a notice of appeal); *Finch v. City of Vernon*, 845 F.2d 256, 259-60 (11th Cir. 1988) (per curiam) (same); *Frace v. Russell*, 341 F.2d 901, 903 (3d Cir.) (same), *cert. denied*, 382 U.S. 863 (1965). *But see Jurgens v. McKasy*, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990) (appellate brief may not serve as notice of appeal); *United States v. Cooper*, 876 F.2d 1192, 1196 (5th Cir. 1989) (same).

[9] *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3949, at 357 n.7 (1977) (collecting cases supporting proposition that " 'liberal view' is not necessarily limited to papers filed by indigent defendants").

[10] The *Foman* Court was interpreting Rule 73(b) of the Federal Rules of Civil Procedure ("Rule 73(b)"), which is Rule 3(c)'s predecessor. The provisions of Rule 73(b) were incorporated into Rule 3(c) without substantive change.

> The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions [to vacate the judgment and to amend the complaint] as an effective, although inept, attempt to appeal from the judgment sought to be vacated.

Id. at 181. *Foman's* message is direct: an appeal shall not be dismissed where the party's intent to appeal a judgment is clear and the other parties to the appeal are not prejudiced by the deficiencies in the notice of appeal.[11]

More recently, in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), this Court reaffirmed *Foman's* liberal approach to Rule 3(c) and held that functional equivalence is the correct measure of compliance:

> We do not dispute the important principle for which *Foman* stands – that the requirements of

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[11] Indeed, even before *Foman*, this Court made it clear that courts were not to divest themselves of jurisdiction through "hypertechnical" interpretations of notices of appeal. In *Hoiness v. United States*, 335 U.S. 297 (1948), this Court interpreted a since-repealed statute which stated, *inter alia*, that "[n]o . . . proceedings in civil causes . . . shall be abated . . . for any defect or want of form." *Id.* at 300 n.6. In reversing the dismissal of the case, this Court stated that "[i]t seems to us hypertechnical to say that the appeal papers did not bring the sole issue of the case fairly before the Court of Appeals. . . . The failure to use the words August 5, 1946, if that be taken as the date of the final decision, was as insubstantial as a misspelling of the words would have been, since the words used identified the rulings which were challenged, and in no way altered the scope of review." *Id.* at 301.

> the rules of procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits. Thus, if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.

Id. at 316-17 (citation omitted). The *Torres* Court, however, held that the complete absence of Torres's name from the notice of appeal filed by the 15 other appellants prevented a finding that Rule 3(c), "even liberally construed," was satisfied. *Id.* at 317. Permitting an appeal in Torres's name to move forward under those circumstances, this Court concluded, would prejudice the other parties to the appeal: there must be "some designation that gives fair notice of the specific individual or entity seeking to appeal." *Id.* at 318.

The Fourth Circuit's blanket exclusion of briefs from the functional equivalence approach cannot be squared with the liberal approach to Rule 3(c) required by *Coppedge*, *Foman*, and *Torres*. As these decisions make clear, to perfect jurisdiction a party need only file a document within the appropriate time period, which, liberally construed, complies with Rule 3(c). Thus, the *Foman* Court, while assuming the "ineffectiveness of the first" notice of appeal, nonetheless found the second notice to be valid, although it identified the wrong order being appealed from and thus, strictly speaking, was not in compliance with Rule 3(c). *Foman*, 371 U.S. at 181; *see also Sanabria v. United States*, 437 U.S. 54, 67 n.21 (1978) (dicta) ("A mistake in designating the judgment appealed from is not

always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced.").

Since *Foman*, the courts of appeals have taken a liberal approach when interpreting Rule 3(c)'s requirements. For example, it is not uncommon for lawyers, as well as pro se litigants, to make mistakes when designating the judgment or order appealed from. The courts have consistently construed this requirement liberally to prevent jurisdiction from being defeated. In this regard, the following statement from the Fifth Circuit is typical: "[f]ailure to properly designate the order appealed from is not a jurisdictional defect, and may be cured by an indication of intent in the briefs or otherwise." *United States v. Rochester*, 898 F.2d 971, 976 n.1 (5th Cir. 1990).[12]

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[12] *See also Williams v. Guzzardi*, 875 F.2d 46, 49 (3d Cir. 1989) ("We have appellate jurisdiction over orders not specified in the notice of appeal if there is a connection between the specified and unspecified order, the intention to appeal the unspecified order is apparent and the opposing party is not prejudiced and has a full opportunity to brief the issues."); *Grubb v. Federal Deposit Ins. Corp.*, 868 F.2d 1151, 1154 n.4 (10th Cir. 1989) ("When a party files a notice of appeal that is technically defective because it designates the appeal as from the denial of a motion for judgment n.o.v. or for a new trial, we may treat the appeal as taken from the final judgment if the appeal is otherwise proper, the intent to appeal from the final judgment is clear, and the opposing party was not misled or prejudiced."); *McAninch v. Trader's Nat'l Bank*, 779 F.2d 466, 467 n.2 (8th Cir. 1985) (single notice of appeal filed in consolidated appeal held to be sufficient even though it did not specify an appeal from order granting summary judgment or an order dismissing one party from the action: "there is a policy of

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The courts of appeals have accepted all manner of inexact designations as satisfying the Rule. *See, e.g., Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1456 n.1 (9th Cir. 1983) ("We assume jurisdiction over both the age discrimination and national origin discrimination claims even though Haddad's notice of appeal states that appeal is taken from a 'judgment on the verdict,' and thus might be technically interpreted to refer only to the age discrimination claim decided by the jury."); *United States v. Christoph*, 904 F.2d 1036, 1040 (6th Cir. 1990) (motion for enlargement of time held to be valid notice of appeal since the "motion named the parties, specified the court being appealed to, and gave the case number in the lower court . . . [which] is all that is required by [Rule] 3(c)"), *cert. denied*, 111 S. Ct. 713 (1991).

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liberal construction of notices of an appeal in situations where intent is apparent and there is no prejudice to the adverse party"), *cert. denied*, 476 U.S. 1182 (1986); *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1546 (7th Cir. 1985) ("The general rule which has developed is that an error in designating the judgment or a part thereof will not result in a loss of appeal if the intent to appeal from the judgment complained of may be inferred from the notice and if the appellee has not been misled by the defect."); *Incas & Monterey Printing & Packaging, Ltd. v. M/V Sang Jin*, 747 F.2d 958, 963 n.15 (5th Cir. 1984) ("The requirement of F.R.App.P. 3(c) that a notice of appeal designate the judgment from which it is taken is not to be so strictly construed as to defeat an appeal where appellant's overriding intent to appeal is clear."), *cert. denied sub nom.* 471 U.S. 1117 (1985); *Vargas v. McNamara*, 608 F.2d 15, 21 (1st Cir. 1979) ("While plaintiffs made a technical error in their notices of appeal [by failing to designate final judgment], there was never any doubt as to the subject matter of the appeal.").

These decisions recognize that the essential purpose of a notice of appeal is to announce the appellant's intention to appeal. It neither assigns specific error nor puts forth legal arguments. Its function is straightforward: it requires parties to announce whether or not they will appeal a judgment or order within a fixed period of time. When the intent to appeal is understood, liberal construction of the Rule 3(c) requirements does not prejudice other parties. As such, liberal construction of Rule 3(c) " 'reject[s] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept[s] the principle that the purpose of pleading is to facilitate a proper decision on the merits.' " *Foman*, 371 U.S. at 181-82 (*quoting Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

II. SMITH'S INFORMAL BRIEF IS THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL BECAUSE IT SATISFIED THE REQUIREMENTS OF RULE 3(C), WAS TIMELY FILED, AND PUT THE COURT AND THE OTHER PARTIES ON NOTICE OF SMITH'S INTENT TO APPEAL THE JUDGMENT ENTERED AGAINST HIM

Rule 3(c) requires a party taking an appeal to: 1) specify the party taking the appeal; 2) name the court to which the appeal is taken; and 3) designate the judgment, order or part thereof appealed from. Smith's informal brief satisfied these requirements.[13] First, Smith's signature on the brief identified him as the party taking the

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[13] The Fourth Circuit noted the issue but did not decide whether Smith's informal brief adequately designated the judgment appealed from. J.A. 37 n.7.

appeal. J.A. 25. Moreover, because no other individuals had been joined as plaintiffs in the district court case, there could be no doubt that the term "plaintiff" used in the brief referred to Smith.

Second, the brief clearly designated the court to which the appeal was taken: "United States Court of Appeals for the Fourth Circuit" was printed at the top of the first page of the brief. J.A. 23. Also, the document contained answers to questions posed by the Fourth Circuit "about the appeal," clearly evincing Smith's intent to appeal the district court's ruling to the Fourth Circuit. J.A. 23.

Finally, while Smith did not specify the judgment appealed from, the informal brief did include the docket number from his district court case, and contained statements manifesting his intent to appeal the final judgment entered by the district court. In response to the question, "What action do you want the Court to take in this case?," Smith requested, *inter alia*, a "new trial on all issues triable by Jury," J.A. 24, and asked the court to "review all evidence pretaining [sic] to his case, and the award of damages which plaintiff do beleave [sic] was grossly inadequate." J.A. 25. However inartful Smith's other answers to the questions posed by the court may have been, these responses clearly evinced Smith's intent to appeal the district court's judgment.[14]

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[14] The conclusion reached below – that "the normal solicitude afforded to pro se litigants [was] greatly diminished," J.A. 36, because Smith's trial counsel sent him a letter indicating that his first notice of appeal was premature – is incorrect. In

(Continued on following page)

Moreover, as discussed above, this Court and the courts of appeals have permitted appeals to proceed even though the notice of appeal incorrectly identifies the order or judgment appealed from. *See supra* pp. 19-21 & n.12. Even if Smith had included the date final judgment was entered in a notice of appeal, that date would not have provided the other parties with any significant, additional information. The parties would not have been able to discern from the notice of appeal precisely what issues Smith would raise in a formal brief if formal briefing were ordered by the Fourth Circuit. And, because an appeal from a final judgment subsumes all prior, non-final orders entered in the case, Smith would not have been required to list the date of every order which he planned to appeal, but would only be required to list the final judgment. *See, e.g., Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 858 (3d Cir. 1990) (because only a final judgment or order is appealable, the appeal from a final judgment draws in question all prior non-final orders and rulings); *see also* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶203.17[2], at 3-87 (2d ed. 1991) (same).

(Continued from previous page)

general, pro se appeals, such as Smith's, are viewed liberally. *See Coppedge*, 369 U.S. at 442 n.5. Smith's pleadings should be treated with solicitude because there was no genuine attorney-client relationship when he filed his notice of appeal. Smith's attorney had already made it clear that he would no longer represent Smith if he proceeded with an appeal. J.A. 17. Given the instructions Smith had received from the Fourth Circuit to file an informal brief, it is entirely understandable that Smith would disregard his former attorney's letter advising him that his appeal was a nullity. This is particularly true in view of Barry's submission of an informal brief.

In addition to complying with Rule 3(c), Smith's informal brief satisfied the other essential requirement of a valid notice of appeal: it was timely filed. The Federal Rules of Appellate Procedure require that a notice of appeal be filed within 30 days after the date of entry of the order disposing of a motion for judgment notwithstanding the verdict. Fed. R. App. P. 4(a) (1), (4). Smith's brief was filed with the Fourth Circuit on May 4, 1988, 20 days after the district court entered an order denying Ellis's and Porecki's motion for judgment notwithstanding the verdict and well within the required timeframe.[15]

While Smith's informal brief, standing alone, was sufficient to put the court and the other parties on notice of his intent to appeal, it must not be analyzed in the abstract. This Court has held that it is appropriate to consider a notice of appeal filed prematurely to determine whether the other parties understood the appellant's intent to file an appeal. *Foman*, 371 U.S. at 181. When an untimely-filed notice of appeal is rendered a nullity under Rule 4(a)(4), the premature notice of appeal may still be considered in assessing whether the second document filed satisfies the purpose of Rule 3(c):

> This resort to the defective notice of appeal neither transgresses nor undermines the unequivocal proscription of Rule 4(a)(4). We

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[15] In addition, Smith's informal brief was served on all of the parties. Rule 3(d) contemplates that the district court clerk's office will serve notice of the filing of a notice of appeal by mailing a copy of the notice to counsel of record for each party. In the present case, Smith himself performed this function by mailing his informal brief to counsel of record for each party. J.A. 25.

> read that rule as a command that a prematurely-filed notice of appeal is not viable, and not as a barrier to its recognition simply as a source of information serving opposing parties and the court alike.

Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan, 835 F.2d 881, 889 n.74 (D.C. Cir. 1987).

Here, as in *Nichols*, the other parties' responses to Smith's defective notice of appeal and his informal brief demonstrate that they understood Smith's intent and were prepared to defend against the appeal. The State employees specifically acknowledged that Smith was taking an appeal and stated that they were prepared to defend against it. They filed a motion on September 29, 1988, requesting that they be allowed to withdraw voluntarily their own appeal of the district court's decision to deny their motion for judgment notwithstanding the verdict. Joint Appendix filed in the Fourth Circuit at 132-33. In this motion, they acknowledged Smith's appeal by stating "[We] move . . . to proceed with Appellant's Pro Se Appeal," and affirmed that they stood "ready to defend the appeal filed in Pro Se by Appellant William Lewis Smith." *Id.* at 133. Moreover, in their brief to the Fourth Circuit, the State employees acknowledged that "[s]urely, Appellees were aware that the Appellant intended to appeal by reason of the filing of his premature notice of appeal and proceeded thereafter in accordance with court instructions." Fourth Circuit Brief for Appellees at 10 n.3.

Similarly, Barry indicated by his actions that he both understood Smith's intent and was prepared to defend against the appeal. Barry filed an informal brief on April

28 in response to Smith's premature appeal. J.A. 19-22. Because the only issue involving Barry was whether the district court properly dismissed him from the case, Barry only needed to know that Smith filed an appeal to determine how to respond. Barry's informal brief asked the Fourth Circuit to affirm the district court's decision dismissing him under *Calvert*, and did not mention any defect in Smith's notice of appeal.

About two months after Barry filed his informal brief, this Court decided *West v. Atkins*, which overruled *Calvert*. Barry then filed a supplement to his brief on June 24 claiming that, notwithstanding *West*, his dismissal from the case should be affirmed because "no appeal from the December 26, 1984 Order of Dismissal was taken by the plaintiff." J.A. 28. Barry argued that, because Smith's notice of appeal identified the order from which Smith was appealing as the order entered on March 15, 1988, and not the order entered on December 26, 1984 dismissing Barry, the propriety of Barry's dismissal was not properly before the Fourth Circuit. J.A. 28. Barry's supplement again did not indicate that Smith's notice of appeal was premature.

Regardless of the substance of Barry's informal and supplemental briefs, the critical point is that Barry's response demonstrates that he recognized Smith's intent to appeal his dismissal from the case. It is apparent that Barry's belated interest in the technical requirements of Rule 3(c) was prompted by this Court's decision in *West*, which overruled the case he relied on to obtain dismissal from the action.

Because all of the opposing parties clearly recognized Smith's intent to appeal, they cannot claim that a decision

allowing Smith's informal brief to serve also as a notice of appeal would prejudice them because they were not prepared to defend Smith's appeal. In the absence of prejudice, however, this Court has held that jurisdiction is perfected when the appellant has filed a timely, but technically deficient, notice of appeal. *Compare Foman*, 371 U.S. at 181 (allowing technically defective notice of appeal because defect did not mislead or prejudice defendant) *with Torres*, 487 U.S. at 317-18 (disallowing notice of appeal which never designated petitioner as party to action because allowing it would have left appellee and Court uncertain of binding effect of adverse ruling on petitioner). Because neither Barry nor the State employees were misled by the defects in Smith's notice of appeal and informal brief, this Court should recognize Smith's brief as a valid notice of appeal.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and the case should be remanded for consideration of petitioner's appeal.

Respectfully submitted,

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APPENDIX

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of Right – How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

* * *

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

* * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

1967 Note

General Note. Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional," United States v. Robinson, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules (FRCP 5(e), 73 [Rules 5(e) and 73, Federal Rules of Civil Procedure, this title]; FRCrP 37 [rule 37, Federal Rules of Criminal Procedure, Title 18, Crimes and Criminal Procedure)], and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules. Illustrative decisions are: Fallen v. United States, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964) (notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant "did all he could" to effect timely filing); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); Halfen v. United States, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); Riffle v. United States, 299 F.2d 802 (5th

Cir. 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing "a liberal view of papers filed by indigent and incarcerated defendants" are listed in Coppedge v. United States, 369 U.S. 438, 442, n. 5, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

* * *

1979 AMENDMENT

Note to Subdivision (c). The proposed amendment would add the last sentence. Because of the fact that the timely filing of the notice of appeal has been characterized as jurisdictional (See, e.g., *Brainerd v. Beal* (CA7th, 1974) 498 F.2d 901, in which the filing of a notice of appeal one day late was fatal), it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. See, e.g., *Cobb v. Lewis* (CA5th, 1974) 488 F.2d 41; *Holley v. Capps* (CA5th, 1972) 468 F.2d 1366. The proposed amendment would give recognition to this practice.

When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) of the F.R.C.P. See Note to Rule 4(a)(6), *infra*.

* * *

Rule 4. Appeal as of Right – When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

* * *

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any

other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

* * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419.)

* * *

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

* * *

1979 AMENDMENT

* * *

Subdivision (a)(2). The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., Matter of Grand Jury Empanelled Jan. 21, 1975, 541 F.2d 373 (3d Cir. 1976); Hodge v. Hodge, 507 F.2d 87 (3d Cir. 1976); Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971); Ruby v. Secretary of the Navy, 365 F.2d 385 (9th Cir. 1966); Firchau v. Diamond Nat'l Corp., 345 F.2d 269 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

Subdivision (a)(4). The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has

before it a motion the granting of which would vacate or alter the judgment appealed from. See, e.g., Keith v. Newcourt, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e.g. Stockes v. Peyton's Inc., 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the "termination" of the "running" of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

Subdivision (a)(5).

* * *

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the

granting of other extensions of time under Rule 26(b) seems to be more appropriate.

APPENDIX OF FORMS

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____

File Number _____

A. B., Plaintiff	)	
	)	Notice of Appeal
v.	)	
C. D., Defendant	)	

Notice is hereby given that C.D., defendant above named, hereby appeals to the United States Court of Appeals for the ___ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the ___ day of ___, 19___.

(S) _____

_____

(Address)
Attorney for C.D.

UNITED STATES COURT OF APPEALS –
FOURTH CIRCUIT

Rule 34(b). Informal Briefs

Whenever an application for a certificate of probable cause from the denial of a writ of habeas corpus or an appeal taken from the denial of a motion under 28 U.S.C. § 2255, or any pro se appeal, shall be filed, the Clerk shall notify the appellant that he may file, within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

IOP 34.6. Informal Briefs

Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the Clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed with the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review. The Court does not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

IOP 46.5. Proceeding Pro Se

An individual may proceed without the aid of counsel, but should so inform the Court at the earliest possible time. In any pro se appeal, the Clerk shall notify the parties that they shall file informal briefs as provided by Local Rule 34(b). The Court will independently review the record for meritorious claims and will also consider the need for the appointment of counsel when reviewing the appeal under Local Rule 34(a). Cases involving pro se litigants are ordinarily not scheduled for oral argument.